Show Industries, Inc. *and* General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL–CIO. Cases 21–CA–28364 and 21–CA–28497

September 27, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 19, 1993, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondent has excepted to the judge's finding that shortly after the August 16, 1991 layoffs the Respondent hired three new employees. The Respondent contends that this finding is contrary to the record. In adopting the judge's finding, we note that Jt. Exh. 17 indicates that employees Marco Rodriquez, Daniel Guillen, and Jose Jimenez were hired on September 10, 1991. We correct the judge's statement that the seniority list reflects no other employee with a seniority date preceding German Jerez' initial date of hire and only three other employees more senior to Miguel Falcon and Jose Marroquin. We find that there were two employees senior to Falcon and four employees senior to Jerez and Marroquin. However, that does not affect the result in this case, because we agree with the judge's finding that the three discharged employees were among the most senior of the Respondent's employees.

[2] Chairman Stephens and Member Raudabaugh find it unnecessary to address the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by implementing its new wage schedule in January 1992. In their view, the Respondent's exceptions to this conclusion do not meet the minimum requirements of Sec. 102.46(b) of the Board's Rules and Regulations. The Respondent merely cites to the judge's decision and fails to allege either in its exceptions or its supporting brief, the particular error it contends the judge committed in so concluding, or on what grounds it believes the judge's decision as to this violation should be overturned. In these circumstances, Chairman Stephens and Member Raudabaugh find in accordance with Sec. 102.46(b)(2) that the Respondent's exception on this point may be disregarded.

Contrary to his colleagues, Member Devaney finds that the Respondent's exception to that portion of the judge's decision in which it is found that the Respondent violated Sec. 8(a)(5) of the Act by failing to bargain over wage changes, while not in strict compliance with the Board's Rules, is sufficient to warrant Board consideration. On the merits, Member Devaney agrees with the judge's finding, for the reasons stated by him, that the Respondent's unilateral implementation of a new wage schedule plan in January 1992 was unlawful.

[3] We have modified the judge's recommended Order to provide traditional reinstatement language for employees Falcon, Jerez, and Marroquin. We have substituted a new notice to conform to the traditional reinstatement language in the Order.

AMENDED REMEDY

In the remedy section of his decision, the judge properly stated that the Respondent would be required to bargain with the Union concerning the effect on employees of the sale of its City One Stop operation. The judge correctly determined that the appropriate remedy for employees terminated on August 16, 1991, other than Miguel Falcon, German Jerez, and Jose Marroquin, was that prescribed in *Transmarine Navigation*.[4] However, the judge erroneously awarded backpay from August 16, 1991, the date the employees were discharged. We amend the judge's remedy to require, in accordance with *Transmarine Navigation*, supra, that backpay be awarded commencing 5 days after the date of this Decision and Order. In all other respects we adopt the remedy section of the judge's decision. We shall modify the judge's recommended Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Show Industries, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

''(c) Make all employees who were terminated on August 16, 1991, as a result of the sale of the City One Stop operation, other than Miguel Falcon, German Jerez, and Jose Marroquin, whole in the manner set forth in the amended remedy section of the Board's Decision and Order.''

2. Substitute the following for paragraph 2(d).

''(d) Offer Miguel Falcon, German Jerez, and Jose Marroquin immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of the Board's Decision and Order.''

3. Substitute the attached notice for that of the administrative law judge.

[4] 170 NLRB 389 (1968).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of the following employees we employ:

> All packers, shipping and receiving clerks, order pickers, stockers, fixture handlers, warehouse employees, poster shippers, truck drivers, janitors, and inventory employees employed by our facility located at 2551 South Alameda Street, Los Angeles, California; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT terminate employees in order to discourage membership in General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, or because they testify in Board proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees because they exercise their rights guaranteed by the National Labor Relations Act.

WE WILL, on request, bargain with General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL–CIO concerning the effects on our employees of the sale of City One Stop and concerning the wage schedule we implemented in January 1992, withdrawing that schedule if requested to do so by Local 598.

WE WILL offer Miguel Falcon, German Jerez, and Jose Marroquin immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL notify Miguel Falcon, German Jerez, and Jose Marroquin in writing that we have expunged any reference to their unlawful August 1991 terminations from our records and that we will not rely on those terminations in any future personnel actions involving them.

WE WILL pay employees laid off on August 16, 1991, other than Miguel Falcon, German Jerez, and Jose Marroquin, for the wages they lost, with interest, during the period set forth in the Decision and Order of the National Labor Relations Board.

SHOW INDUSTRIES, INC.

Ami Silverman, Esq., for the General Counsel.
Robert M. Lieber and *Marjorie S. Fochtman, Esqs. (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, for the Respondent.
Stephen Yoder, Esq., General Counsel, Show Industries, Inc., of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this matter on May 21 and 22, 1992, at Los Angeles, California. It arises from separate unfair labor practice charges filed by General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL–CIO (Union) against Show Industries, Inc. (Respondent or Company) on November 7, 1991, and January 31, 1992.[1]

On December 27, the Acting Regional Director for Region 21 of the National Labor Relations Board (NLRB or Board) issued a complaint in Case 21–CA–28364. On March 31, 1992, the same Acting Regional Director consolidated the two cases and issued consolidated amended complaint (complaint) alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (Act). The complaint incorporated a notice of hearing before an administrative law judge.

Respondent answered the complaint on April 13, 1992, denying that it engaged in the unfair labor practices alleged by the Acting Regional Director.

After carefully considering the record, the demeanor of the witnesses, and the posthearing briefs, I find Respondent engaged in the unfair labor practices alleged based on the following

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. *The Pleadings*

The General Counsel alleges that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union, the certified employee representative, since July 30 concerning the effects on unit employees resulting from the sale of its City One Stop operation, a portion of its business enterprise. The General Counsel alleges that Respondent violated the same section by refusing to bargain in good faith since October 24 concerning the implementation of a new wage schedule applicable to unit employees.

The General Counsel further alleges that Respondent violated Section 8(a)(3) and (4) of the Act by discharging Jose Marroquin, German Jerez, and Miguel Falcon in order to discourage membership in a labor organization and because they testified at a hearing before the Board in Case 21–RC–

[1] Unless shown otherwise, all other dates refer to the 1991 calendar year.

18569. Although the General Counsel alleges that Respondent also violated Section 8(a)(1) of the Act derivatively by all the foregoing conduct, no independent 8(a)(1) violations are alleged.

Respondent admits the General Counsel's jurisdictional allegations and, at the hearing, stipulated that two supervisors named in the complaint are supervisors within the meaning of the Act. Respondent further admits the appropriateness of the unit alleged in the complaint, the Board's certification of the Union as the exclusive representative of that unit but denies that the Union is the 9(a) representative of the unit employees.

Respondent admits that it notified the Union on July 30 concerning the sale of its City One Stop operation and that it notified the Union on October 24 concerning its intention to implement a new wage schedule but it denies that it engaged in the unfair labor practices alleged in connection with these matters or that it has unlawfully refused to bargain with the Union at all. Respondent also admits that it discharged the three employees named above but denies that it engaged in any unfair labor practice by doing so.

B. *Background*

Respondent, a California corporation which maintains its principal facility in Los Angeles, California, is engaged in the wholesale merchandising of recorded music, videos, and related products.[2] The Company, a subsidiary of an entity known as Shamrock Holdings (Shamrock), distributes primarily to Music Plus, a 91-store retail subsidiary of Shamrock mainly located in areas throughout southern California.

One aspect of this dispute grows out of the sale of Respondent's City One Stop division in August. This division distributed audio and video products to numerous unrelated ''mom and pop'' retail outlets. Essentially this division was a miniaturized version of the remainder of Respondent's warehouse operation designed to provide full service for independent retail outlets in its customer base. However, a few functions—for instance, returned merchandise from the independent retailers—were handled by the larger warehouse.

Respondent classifies its unit employees as drivers, janitors, lead persons, packers, pickers, pricers, receivers, recyclers, shippers, stockers, and support personnel, all engaged in work typical to a warehouse distribution facility in a variety of departments organized along product or functional lines.

At the time of this hearing, Respondent employed approximately 111 employees, including its supervisors and managers. This work force is considerably below the 190 employees eligible to vote in a 1989 NLRB election. However, apart from the 15 employees laid off in connection with the City One Stop sale, Respondent's employee complement shrank as business declined through 1990 and 1991 by attrition and individual terminations.

C. *The Representation Proceeding*

In 1989, the Union conducted an organizing campaign among Respondent's employees which culminated in an NLRB election on November 30 of that year.[3] Employees chose representation by nearly a 2 to 1 margin. The Company filed four timely objections to the election but, in a report issued on January 2, 1990, the Regional Director found that all objections lacked merit and recommended that the Board certify the Union.

Pursuant to Respondent's exceptions to the Regional Director's report, the Board remanded the proceeding on September 7, 1990, for a hearing on two of the objections. One remanded objection dealt with questions arising from damage to the election ballot box between voting sessions caused by an automobile accident involving the Board agent who was transporting the ballot box. The other remanded objection raised a *Savair* issue.[4]

Subsequently, Hearing Officer Susan L. Seeck conducted 3 days of hearings in October and November 1990 concerning the remanded objections and, following the resolution of certain interim appeals to the Board, issued her report on February 27. She found the two remanded objections lacked merit and recommended that the Board certify the Union which it did on May 21 after rejecting Respondent's exceptions to Seeck's report as untimely filed.

D. *The Certification Challenge*

Following the Union's certification, its secretary-treasurer, Joe Campbell, wrote Company President Lou Fogelman asking to meet for the negotiation of a collective-bargaining agreement. Campbell's May 30 letter further asked that the Company furnish information in advance of the meeting, including employee home addresses and phone numbers, dates of hire, current pay rates, pay policies, classifications, benefits, and recognized holidays.

Attorney Lieber responded to Campbell declining ''to enter into a formal bargaining relationship . . . until our contentions have been ruled upon by the appropriate administrative body or court.'' Lieber also declined to furnish the information requested on the ground that the request was ''premature.'' The Union renewed its request to bargain and for information following the rejection by the Board of Respondent's motion for reconsideration pertaining to the timeliness of its exceptions. Attorney Lieber again declined both requests asserting Respondent's intention to test the lawfulness of the certification in the court of appeals.

Thereafter, the Union filed an unfair labor practice charge in Case 21–CA–28159 alleging that Respondent's refusal to bargain and supply information violated Section 8(a)(5). On November 21, the Board issued a Decision and Order granting the General Counsel's Motion for Summary Judgment and finding that the Company had unlawfully refused to recognize and bargain with the Union.[5] Enforcement of that Order is presently pending in the Court of Appeals for the Ninth Circuit.

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[2] Respondent's direct outflow annually exceeds the dollar volume established by the Board for exercising its statutory jurisdiction over nonretail enterprises. I find that jurisdiction to resolve this labor dispute lies with the Board.

[3] The election followed the filing of a petition in Case 21–RC–18569 on October 4, 1989, and the execution of a stipulation for consent election.

[4] This objection alleged that the Union offered to waive dues and fees for employees who executed authorization cards prior to the election contrary to the rule in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

[5] *Show Industries*, 305 NLRB No. 72 (Nov. 8, 1991) (not reported in Board volumes).

E. *The Sale of City One Stop*

By letter dated July 30, Company General Counsel Yoder notified the Union that Respondent had entered into an agreement to sell its City One Stop operation to a new owner and inviting contact from the Union ''[i]f you wish to discuss this event any further, or the potential impact on warehouse employees.'' When Union Agent Ruben Corral telephoned Yoder the following week to inquire what effect the sale would have on employees, Yoder told Corral that he ''didn't know'' but promised a response to Corral's question after he ''talk[ed] to his people.'' Although Corral did not specifically ask to meet over the matter at that time, he told Yoder that the Union wanted to ''do something'' for the City One Stop employees.

During the same week of the Corral call, Yoder held one or more meetings with the warehouse manager, Hermes Salazar, and the Company's director of personnel and payroll, Patricia Mitchell-Guenett. Yoder instructed Salazar to select 15 employees for layoff from the entire employee complement based on their salary, skills, job performance, and counseling (disciplinary) records even though only 12 employees were directly employed in the City One Stop operation at the time. According to Yoder, the salary criteria was designed to reduce the Company's payroll costs by terminating workers with high wage rates.

Salazar testified that he selected individuals for layoff after consulting with the department managers. Mitchell-Guenett testified that she met with Yoder and Salazar late in the week preceding August 14 or early in the week which included August 14 to review list of 23 employees who apparently were under consideration for layoff. As a result of this meeting, Yoder instructed Mitchell-Guenett to split the list between those who would be laid off and those who would be retained. Mitchell-Guenett thereafter prepared a 5-page list; the first 4 pages contain an alphabetized list of 16 employees who, with a single exception, were later terminated and the fifth page lists those employees who were retained. Of the eight employees retained, six were City One Stop employees.

Early on the morning of August 14, Yoder posted a letter to Corral advising that 15 employees would be terminated on August 16. The letter states that ''[w]e are in the process of identifying the employees who will be affected'' and that their identity would not be known ''until late tomorrow or sometime Friday morning.'' Yoder advised ''that the affected group will consist of some of the workers who previously performed work for City One Stop and that the balance of the City One Stop workers will be absorbed in to the regular warehouse operation resulting in the displacement of some of the regular warehouse employees.'' Yoder concluded by inviting Corral to ''contact me if you would like any additional information concerning the foregoing.'' Corral said that he received this letter the following day or the day thereafter.

Thereafter, Yoder met with Mitchell-Guenett and Salazar at 11 a.m. on August 14. At this meeting, the three agreed on the identity of the employees who would be terminated and, coincidentally, on the City One Stop employees who were to be transferred to the regular distribution operation.[6] Yoder questioned whether there was a balance between union supporters and nonsupporters within the group to be terminated. Salazar speculated about the union sympathies of each employee about to be terminated but, at the hearing, both Yoder and Mitchell-Guenett professed an inability to recall anyone Salazar identified as a likely union supporter.

At approximately lunchtime on August 16, the 15 employees were called to a conference room individually and terminated effective immediately.

Within a week or two, Corral telephoned Yoder again. Corral claims that he told Yoder on this occasion that he wanted to bargain over the effects of the City One Stop sale and asked for a seniority list. Corral asserts that Yoder promised to get back to him about bargaining and asked that he submit a written request for the seniority list.[7]

Although Yoder acknowledged that Corral's account about the seniority list request in this second conversation, he emphatically denied that Corral asked to bargain about the City One Stop sale effects. All agree that no effects bargaining ever occurred and no evidence shows that any other request to bargain about this subject was ever made.

F. *The Alleged Unlawful Discharges*

Falcon, Jerez, and Marroquin were among the 15 employees terminated on August 16. None of these men were directly employed in the City One Stop operation although Falcon, and two others who were not laid off, processed City One Stop returns in the course of their work in the regular warehouse returns department.[8] Jerez worked as a picker in the cassette department; Marroquin worked as a receiver in the same department.

At the time, the three men were among the most senior employees: Falcon was first hired on July 9, 1981; Jerez was first hired on November 13, 1980; and Marroquin was first hired on June 12, 1981. However, Jerez quit on May 31, 1985, to leave the country but was reemployed in October 7 of that year and worked continuously thereafter until his August 16 termination. The seniority list furnished to the Union on September 17 reflects no other employee with a seniority date preceding Jerez' initial date of hire and only three other employees more senior to Falcon and Marroquin.

In addition, Jerez' $8.25-per-hour pay rate was the highest among the Company's nonsupervisory employees as of August 16. Falcon and Marroquin earned $7.25 and $7.20, respectively, at that time. Excluding these three men, the median hourly rate of the 12 others laid off with them was $5.625; their average hourly rate was $5.825. The wage rates for three of the six City One Stop employees retained were above that average hourly rate.

At the beginning of the 1989 organizing drive, Falcon and Marroquin met with Union Organizer Gonzales and were given union authorization cards. They in turn selected other individuals to assist in soliciting employees to sign the union

[6] Presumably at this final meeting, a decision was made to retain Pedro Valencia-Figueroa, one of the employees on the first four pages of Mitchell-Guenett's divided list.

[7] Union Attorney Phillips wrote Yoder on September 6 asking that the seniority list be furnished ''within one week.'' No mention is made in Phillips' letter about effects bargaining. Yoder supplied the list by a letter dated September 17.

[8] Falcon testified that he also processed returns from the Music Plus stores and that he filled in for the department manager when he was absent.

cards. This group of about 10 employees comprised the Union's original employee organizing committee.

Falcon, Jerez, and Marroquin all attended preelection union meetings. Marroquin distributed handbills in the company parking lot at times prior to the election and served as the Union's official observer at the NLRB election.

Hearing Officer Seeck's objections report reflects that Falcon, Jerez, Marroquin, and Alfredo Larios-Cruz, another employee still employed, testified on the Union's behalf at the objections hearing concerning the *Savair* objection. Essentially, they sought to rebut testimony by employee witnesses presented by the Company concerning impermissible statements purportedly made by union agents about the Union's dues and fees waiver policy. The report also reflects that Marroquin and Jerez testified about the Union's distribution of handbills explaining its dues and fees waiver policy at preelection union meetings and at the Company's parking lot.

Ultimately, Hearing Officer Seeck concluded that the evidence failed to support the claim that Union Organizer Gonzales made any impermissible statements about the waiver of dues and fees. She further concluded that an impermissible explanation of the Union's policy on this subject by an employee organizer was overcome by the extensive distribution of the Union's official, and legitimate, waiver policy in writing. For these reasons, she recommended that the objection be overruled.

Apparently following the Union's certification and Respondent's refusal to bargain, the Union staged a series of demonstrations at certain Music Plus stores, at the Shamrock headquarters in Burbank, California, and at the home of Roy Disney, a Shamrock principal, in order to pressure Respondent to the bargaining table for negotiations. Up to 45 company employees participated in these demonstrations including Marroquin and Falcon. Marroquin asserted without contradiction that Salazar and other managers observed some of the demonstrations. And during the demonstration at the Shamrock headquarters, Marroquin was interviewed for a local television news report.

Marroquin asserted that Supervisors Salazar and Terese Armador spoke to him about the Union approximately 10 times in the 6-month period before his termination. During these engagements, Marroquin claims that Salazar threatened to terminate him because he sympathized and collaborated with the Union, and for being a witness at the objections hearing. In addition, Salazar also purportedly told Marroquin that it would be better for him to abandon his union activities or he would be laid off. These statements, Marroquin claimed, were made in the presence of several other employees, at least six of whom he identified by name. None of those identified as present were called to corroborate Marroquin's account concerning Salazar's purported threats and the absence of only one, Jerez, was ever explained.[9]

Falcon testified that he received a 35-cent-per-hour pay increase in late March or early April. He claimed that Salazar informed him of the increase privately and told him that he was receiving the raise even though he was involved with the Union.

Salazar denied that he made the threats and disparaging statements attributed to him by both Marroquin and Falcon. He asserted that as he had not become the warehouse manager until early 1991, he was not aware of the identity of employees who testified at the objections hearing. Salazar, who had been the video department manager before he was promoted to the warehouse manager's position, claimed that, with but one exception, he never spoke to any of the employees about the Union because he had been cautioned against doing so by the Company's consultant during the election campaign. That single exception, Salazar said, related to a conversation with Jerez. When cross-examined on this point, Salazar said that the Jerez conversation to which he had referred occurred sometime in 1991. Thereafter, Salazar denied that the word ''Union'' was ever mentioned in that conversation and persisted in evading questions about what, specifically, he had said to Jerez.[10]

Mitchell-Guenett, Salazar, and Steven Figueroa, a personnel payroll assistant, were present at Marroquin's termination interview. Salazar told Marroquin that he was being terminated because City One Stop had been sold. Marroquin asked why he was being terminated and Mitchell-Guenett told him only that the Company had to reduce personnel. Marroquin claims that he then asked if he was being let go because of low yield, bad attitude, damaging company property, or failing to follow the rules, Mitchell-Guenett told him that if he wanted an answer he would have to do it by way of a subpoena. Marroquin said that he then turned to Salazar and asked again why he was being terminated. Marroquin asserted that Salazar responded in a ''calculating and cold manner that [it] would take all night to tell [him].''

Although Mitchell-Guenett recalled that Marroquin asked a couple of times why he was being let go, she denied that she ever responded with the subpoena remark attributed to her. Salazar and Figueroa corroborated Mitchell-Guenett on this point and Salazar denied that he made the ''take all night'' statement.

Falcon claims that he asked Salazar at his termination interview if he could ask why he was being laid off and Salazar told him ''no.'' Salazar, who could recall little about Falcon's termination interview, did not deny Falcon's assertion.

Over the years, Falcon's work history reflects that he was generally considered to be an excellent worker. At one point he was promoted to an assistant department manager's position but was subsequently demoted in September 1988 based on a poor evaluation in that capacity. Six months later, however, his evaluation noted that he had made a ''[g]reat comeback since demotion.'' Ten months after that, he was verbally counseled for allegedly telling employees to work slowly. In March, he received a 35-cent-per-hour pay increase at the time of his annual evaluation. The amount of that increase was within the top range of increases normally granted under Respondent's prior pay policy.

Both Jerez' and Marroquin's work histories likewise reflect an overall excellent performance marred only by a sin-

[9] In her brief, counsel for the General Counsel stated that she has reason to believe that Jerez did not appear at the hearing because he had returned to his native El Salvador and was unable to obtain a visa in sufficient time to permit his return for the hearing.

[10] When first asked what he had said to Jerez, Salazar responded only that ''[w]e had a conversation.'' When asked again, he answered:

> We—I didn't say anything about the Union. He said I believe and I—whatever I believe—and what I believe and I believe what I believe.

gle verbal counseling in October 1990 and March 1990, respectively, for excessive talking during work hours.

With a single exception, the work histories of others who were terminated on August 16 do not compare favorably at all to Falcon, Jerez, and Marroquin. Moreover, the work histories of two employees apparently considered for termination but eventually retained appear significantly poorer than these three individuals and it can be argued that the remaining employees retained are, at best, only comparable on paper.[11]

By Salazar's account, the high hourly rates of Falcon, Jerez, and Marroquin was the most significant factor which led to their layoffs. Thus, he explained that of the three returns department employees who performed City One Stop work, one was transferred to another job and of the remaining two, Falcon and Bertha Canelo, Canelo did ''the same job'' as Falcon at a far lower salary. As for Jerez, Salazar said that other pickers in the cassette department earned over $2 per hour less and performed equal to or better than Jerez. Salazar suggested that the Company's production reports, not in evidence, substantiated the relative production levels of the pickers. Marroquin, Salazar claimed, was one of two employees performing receiving work in the cassette department and the other employee, who earned significantly less money, was doing an excellent job.

Salazar acknowledged that since he has been the manager, the Company has utilized 8 to 10 temporary employees each day. These employees are procured from an employment agency at a cost to the Company of ''about'' $6.75 per hour. Less than a month after the layoff, the Company hired three new full-time employees, all at the minimum rate of $4.25 per hour.

G. *The Wage Schedule Changes*

Prior to January 1992, Respondent maintained an unwritten compensation scheme without hourly wage rate caps. Employees earning $5.50 per hour or less were evaluated for pay increases each 6 months; above that amount evaluations were performed annually. All evaluations occurred at or near the employee's employment anniversary date. Following the evaluation, wage rate adjustments could range up to 40 cents per hour. Increases, Salazar said, never exceeded 40 cents per hour ''no matter what you do.''

Perhaps as early as July, Respondent's officials began to study revisions to that pay scheme. Under the system eventually devised, employees were divided into new functional categories. Each category was assigned a wage rate cap and a maximum incremental increase. At the same time, the Company undertook to revise its performance evaluation format.

Yoder notified the Union by letter dated October 24 of its intention to implement a new wage schedule and invited the Union to notify the Company in writing before November 1 if it desired to ''discuss'' the plan. Campbell responded on October 29 asking Yoder to contact Corral to arrange a meeting to discuss the proposed wage schedule. Shortly thereafter, Corral and Yoder agreed to meet on November 26 but this meeting was later postponed until December 19 at Yoder's request.

On December 19, representatives of the parties met at the office of Attorney Lieber. Lieber, Yoder, Mitchell-Guenett, and Salazar were present for the Company; Agents Thomas Lauer and Gonzales represented the Union.[12]

At the meeting, Yoder outlined the Company's proposal[13] and provided the Union with a list reflecting the functional grouping of each employee by name, their date of hire, and their current wage rate. In addition, he gave the Union a copy of the evaluation form which Respondent planned to use. The Union was advised that the Company wanted to implement the new system early in January and asked for the Union's response to the presentation as soon as possible. During the course of the Company's presentation, Lieber told the union representatives that because of the pending appeal of the prior case, the Company's presence at the meeting did not ''constitute recognition of the Union.''

Lauer asserted that he told the company representatives that the Union would be unable to respond before meeting with the unit employees and claims that he requested the Company to furnish employee addresses and telephone numbers to facilitate that meeting.

Respondent disputes that the Union requested the employee addresses and telephone numbers. Both Yoder and Lieber denied that such a request was made at the meeting. In support of their denials, Respondent introduced Lauer's notes of the meeting which reflect such a request and Lieber's notes which do not. Based primarily on the comparative appearance of the pen strokes between the address and telephone reference in Lauer's notes and the remainder of his notes, Respondent contends that this written reference was added later and is not contemporaneous.[14]

Later that afternoon following the meeting, Lieber telephoned Lauer to apprise him that Fogelman had approved the highest hourly rates and periodic increases in the proposal, and asked when the Company could expect the Union's response. Purportedly, Lauer again asserted that the Union could not reply until it met with the employees and repeated his request for the addresses and telephone numbers. Lieber denied that any such request was made during their conversation and asserted that Lauer said only that he could not ''guarantee'' when the Union would respond because of the busy holiday season.

Having received no response from the Union by January 8, 1992, Yoder wrote to Lauer saying that the Company intended to implement its wage proposal on January 17. Campbell replied to Yoder in writing on January 10 saying that the Union had no opportunity as yet to meet with the em-

[11] The two employees with questionable work histories are Valencia-Figueroa who received 10 counseling notices for a variety of infractions and Oscar Diaz whose absence while serving a jail term was treated as a leave.

[12] Lauer substituted for Corral who was unable to attend. Gonzales is principally an organizer who occasionally attends bargaining sessions but only in an advisory capacity.

[13] At the time, Fogelman had not yet approved the wage plan so the Union was apprised of the potential high and low hourly rates and periodic increases for each employee category. Lieber promised to notify the Union as soon as Fogelman's final approval was received.

[14] In view of the conclusions reached below, I find it unnecessary to resolve this issue. However, Respondent's contention about Lauer's notes is far from frivolous and no mention is made of the disputed request in the spate of correspondence following the December 19 meeting.

ployees because of the holidays and insisted that the Company not implement ''pending the outcome of our negotiations.'' In addition, Campbell voiced the Union's tentative belief that the proposal was unfair and discriminatory toward union supporters, and asked Yoder to telephone so that he could explain the Union's objections in detail ''at a mutually convenient time and date.''

Lieber responded to Campbell on January 16 charging that the Union had been given a fair opportunity to bargain over the previous 4 weeks but had failed to communicate anything of substance. Lieber insisted that Campbell provide his comments in writing as soon as possible but asserted that he could give no assurances, in view of what had transpired to that time, that the Company would not implement ''in the interim.''

On January 27, Union Attorney Phillips wrote to Lieber claiming that the proposal was ''far-reaching'' and required the Union's fair consideration before it could respond. To this end, Phillips asked that the Company furnish ''a list of all current . . . unit employees, together with their present job classifications, wage rates, benefits and proposed changes, if any.'' After receiving that information, Phillips asserted that the Union would be in a better position to respond substantively and asked that the Company delay implementation ''until good faith bargaining can occur.''

In a January 28 letter to Phillips, Lieber claimed that ''[v]irtually all'' of the information requested by Phillips had been given to the Union on December 19. Lieber also argued that the requested material on benefits ''do not relate in anyway to the subject matter at hand.'' Accordingly, Lieber advised that as the Union had thus far failed to respond to the proposal, the Company was ''going forward with [its] implementation.'' That ended the parties' exchanges on this matter.

H. *Further Findings and Conclusions*

1. The 8(a)(5) allegations

Section 8(a)(5) obliges an employer to ''bargain collectively with the representatives of his employees.'' Section 8(d) defines that obligation to include ''the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.''

If its employees are represented by a labor organization, generally an employer may not unilaterally change any employment term which falls within the statutory penumbra of ''wages, hours and other terms and conditions of employment.''[15] Likewise, an employer has a duty to bargain with the representative of its employees concerning the effects on employees resulting from the cessation of all, or part, of its operations.[16]

a. *The City One Stop allegation*

Here, the General Counsel claims that the Union was deprived of any meaningful opportunity to engage in effects bargaining. The General Counsel argues that Corral's undisputed prelayoff ''do something'' statement and the purported postlayoff request by Corral satisfy the Union's obligation to request effects bargaining. The General Counsel asserts that Respondent's conduct, taken as a whole, demonstrates that it was stonewalling the Union's bargaining request until the August 16 layoff became a fait accompli. By doing so, the General Counsel believes that Respondent effectively dissipated the Union's bargaining strength and, accordingly, requests a backpay remedy.

Respondent acknowledges a duty under *First National Maintenance* to engage in effects bargaining, on request, related to the sale of City One Stop. However, Respondent contends that, after it notified the Union of the sale, no request to bargain was forthcoming. Relying on Yoder's assertions, Respondent claims that the Union merely asked for a seniority list which the Company eventually furnished on September 17. Accordingly, Respondent believes that the Union waived its right to bargain about this subject.

I reject Respondent's claim that the Union waived its right to bargain over the effects of the City One Stop sale. In so doing, I find it unnecessary to resolve the conflict in testimony concerning the claimed postlayoff bargaining request. In my judgment Corral's ''do something'' statement was sufficient to put Respondent on notice that the Union desired to engage in effects bargaining when Respondent determined that the sale would adversely affect the unit employees.

After notifying the Union of the sale and inviting the Union to discuss the ''potential impact on warehouse employees,'' Yoder pled ignorance of any potential effects when Corral telephoned in response to his invitation. In the context of Yoder's ignorance plea and his promise to apprise Corral of the potential effects when known, Corral's ''do something'' statement, in my judgment, ''should have left little doubt in the mind of a reasonable person that the Union was interested not only in ascertaining the position of Respondent, but also . . . bargaining with Respondent.''[17]

The principal waiver cases cited by Respondent are factually inapposite to the situation found here. In all of cited cases, the Union had notice of a particular change under consideration by the employer well in advance of its implementation. Hence, the union's mere protest without giving any hint of a desire to bargain in *Clarkwood*,[18] was deemed insufficient as a demand for effects bargaining. In *City Hospital*,[19] the Board inferred a waiver from the union's failure to grieve two out of three changes made by the employer for over 2 months as to the two ungrieved situations. Finally, in *Haddon*,[20] the Board inferred a waiver where the union had notice of a proposed change for well over 5 weeks and actually met with the employer on a related issue but failed to even protest the change until after it was implemented.

By contrast, Yoder's initial notice merely advised the Union about the consummated sale agreement and characterized City One Stop as a ''small part of our total operations.'' It gave no hint whatever concerning the impact the sale might have on employees and, even by the time of Corral's initial call in response, Yoder failed to inform the union agent of what, if anything, would likely occur. Until Re-

[15] *NLRB v. Katz*, 369 U.S. 736 (1961).

[16] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 fn. 15 (1981).

[17] *MCA Distributing*, 288 NLRB 1173, 1174 (1988), quoting *Armour & Co.*, 280 NLRB 824, 828 (1986).

[18] 233 NLRB 1172 (1977).

[19] 234 NLRB 58 (1978).

[20] 300 NLRB 789 (1990).

spondent notified the Union that effects of some kind would likely befall the employees, a specific request to meet could hardly be expected or, for that matter, agreed to.

Where, as here, only a partial cessation of a larger, geographically unified operation occurs, the potential effects on employees could range from practically nothing to matters of critical significance. And in such cases, the potential subjects for effects bargaining may well be far broader than in those situations where the entire operation is about to close, leaving all unit employees faced with termination. Thus, as Respondent's actions suggest, a partial closing can pose issues about absorbing the affected work force into remaining operations, selecting workers for layoff from the entire unit rather than the smaller affected portion, future uses of temporary workers, the criteria for laying off employees, recall rights to the remaining operation, and severance payments.

However, little, if anything, in Yoder's initial notice or conversation with Corral serves to even hint that the sale's potential impact would reach beyond the City One Stop employees. The first disclosure that the sale would affect other unit employees did not come until Yoder sent his August 14 letter. By the time the Union received that letter, all details down to the selection of specific employees for layoff were complete and the process of execution was underway.[21] As the facts summarized above clearly suggest that Yoder, at the very time he initially spoke to Corral or shortly thereafter, was directing Respondent's planned reduction in force, his response to Corral's inquiry about the potential effects must be viewed as somewhat less than truthful.

I am satisfied that the circumstances found here amply demonstrate that, despite giving general notice of the City One Stop sale, Respondent effectively and deliberately presented the Union a fait accompli concerning the sale's consequences on its employees.

These conclusions, derived in the main from Respondent's own witnesses and its own correspondence, establish, I believe, that no good-faith effort was made to provide the Union with a meaningful opportunity to address the effects issues. By effectively freezing the Union out of the effects decision-making process, Respondent put the Union in the position of rubber-stamping its unilateral conduct, or demanding, with little likelihood of success, the restoration of the status quo ante. Entirely aside from diminishing the Union's standing as the exclusive employee representative, itself no small matter in an embryonic collective-bargaining relationship, Respondent's unilateral conduct substantially weakened the Union's bargaining position on the broad range of potential alternatives to the layoff which occurred.

For the foregoing reasons, I have concluded that Respondent violated Section 8(a)(5) of the Act by its failure to provide the Union with a reasonable opportunity to bargain over the effects on employees resulting from the City One Stop sale. The General Counsel's request for a backpay remedy is discussed below.

[21] Although Corral could not recall specifically whether he received that letter on August 15 or 16, the evidence shows that the layoff checks were cut on August 15 in preparation for the layoffs the following day so, in either case, it is reasonable to assume the Union' views would have received little, if any, consideration.

b. *The wage schedule allegation*

The General Counsel contends that Respondent's implementation of the new wage schedule is unlawful notwithstanding the December 19 meeting. Based on Lieber's remarks at that meeting to the effect that, in agreeing to meet with the Union, Respondent was not thereby recognizing the Union as the employee representative, the General Counsel argues that this case is analogous to the conditional offer to meet and bargain found unlawful in *Specialized Living Center*.[22] For this reason, the General Counsel believes that the Union had no obligation to respond at all to the Respondent's wage schedule notice.

In addition, the General Counsel argues that Respondent had no right to implement its proposed wage schedule because it failed to provide the Union with the addresses and telephone numbers requested to facilitate meeting with employees about that matter.

Respondent, which asserts that its duty to bargain with the Union is as yet ''undetermined'' because of the pending test of the certification, argues that it approached the wage schedule matter in good faith by notifying the Union of the proposed change, meeting with the Union to explain the proposal in detail, and then waiting 6 weeks for a substantive response before implementing the proposal. Respondent further argues that it was privileged to implement its new wage schedule in view of the Union's dilatory bargaining tactics concerning that proposal.

In view of Lieber's explicit statement at the December 19 meeting that Respondent was not recognizing the Union, this case, as the General Counsel contends, is indistinguishable from *Specialized Living Center*. There the Board found that a similar statement in a telegram offering to meet and confer with the certified employee representative about work schedule changes rendered the offer ''conditional and did not constitute a good-faith offer to bargain to which the Union was entitled.'' Accordingly, I find Respondent violated Section 8(a)(1) and (5) of the Act as alleged by implementing its wage proposal in late January 1992.

Pointing to the make-changes-at-your-peril holding in *Mike O'Connor Chevrolet*,[23] Respondent complains that the only way it can avoid the ''peril'' of making changes while advancing its position in the earlier case before the court of appeals is to do precisely what it did. Hence, Respondent argues that the result here puts it in a Catch-22 situation.

In the final analysis, Respondent's complaint is premised on its view that its duty to bargain with the Union is still ''undetermined.'' Although that may be true in a certain sense, that premise is without a legal basis. Section 10(g) of the Act explicitly provides that neither a petition for enforcement nor a petition for review of a Board order will ''operate as a stay'' unless specifically ordered by the court. As no such stay has been ordered with respect to the Board's earlier bargaining order—which Respondent essentially disavowed at the December 19 meeting—Respondent's complaint about its predicament is best addressed to Congress rather than me.

[22] 286 NLRB 511 (1987).

[23] 207 NLRB 701 (1974).

2. The 8(a)(3) and (4) allegations

Section 8(a)(3) prohibits employer ''discrimination [against employees] in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization.'' Section 8(a)(4) prohibits an employer from ''discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under [the] Act.'' In *Wright Line*[24] the Board adopted a causation test for cases alleging violations of the Act which turn on employer motivation. Subsequently, the Board summarized the salient aspects of that causation test as follows in the *Hunter Douglas* case:[25]

> The Board held in *Wright Line*, . . . that once the General Counsel makes a prima facie showing that protected conduct was a motivating factor in an employer's action against an employee, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must ''persuade'' that the action would have taken place absent the protected conduct ''by a preponderance of the evidence.'' *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). If an employer fails to satisfy its burden of persuasion, a violation of the Act may be found. *Bronco Wine Co*., 256 NLRB 53 (1981).

The General Counsel believes that Falcon, Jerez, and Marroquin were specifically targeted for layoff in connection with the City One Stop reduction in force, even though their work was virtually unaffected by the sale, because of their support for the Union. Pointing to evidence that Respondent knew of their union activities and Respondent's union animus, the General Counsel asserts that the burden of presenting a prima facie case was met.

The Respondent's defense, according to the General Counsel, that Falcon, Jerez, and Marroquin were terminated as a part of an economic reduction in force resulting from the sale of City One Stop is, at best, an example of a mixed motive where the scale tips toward the conclusion that these three employees would not have been discharged but for their union activity. Additionally, the General Counsel argues that Respondent's claim that these three high wage employees were selected for the August 16 layoff because of a need to reduce payroll costs is, in view of other actions taken by Respondent, a pretext. As the Respondent's explanation for laying off these three union activists fails close scrutiny, the General Counsel contends that the record amply supports a finding that their selection was based on their union support and activity, including their testimony at the representation case hearing on behalf of the Union.

Respondent contends that the General Counsel failed to establish a prima facie case because no evidence was proffered to prove that Salazar—the company official who actually selected the particular employees for the August 16 layoff—had more that a ''hunch'' about the union sentiments of the employees who were laid off. According to Respondent, no evidence of ''direct knowledge'' of the activities of Falcon, Jerez, and Salazar exists.

Even assuming that the General Counsel established a prima facie case, Respondent argues that these three employees were selected for layoff on an ''objective basis without regard for their support for or activity on behalf of the Union,'' i.e., primarily their high wage rates, Respondent's economic need to reduce its payroll costs, and other efficiency considerations.

The General Counsel's evidence establishes that each of these three employees were high profile union supporters. In fact, the evidence shows that Falcon and Marroquin were the employees who initially approached the Union.

Contrary to Respondent's claim, this record does contain uncontradicted direct evidence that Salazar himself witnessed the demonstrations at the Music Plus stores and, therefore, was in a position to have direct knowledge of what surely, from Respondent's point of view, were some of the more inflammatory activities engaged in by Falcon, Marroquin, and other union activists. Indeed, the activities of Marroquin were shown to be so conspicuous for such a lengthy period of time that even a claim by Respondent that it lacked knowledge of his involvement with the Union simply casts a pall over the veracity of Respondent's entire case. Moreover, Salazar admitted that he spoke to Jerez about the Union, the only time he supposedly broke the vow of silence on that subject imposed by the Company's consultant.

For evidence of union animus, the General Counsel points to Respondent's ''continuing'' refusal to bargain with the Union in general as well as Salazar's specific threat to terminate Marroquin, his suggestion to Falcon that his union activity was not regarded favorably, and his refusal to disclose the nature of his remarks to Jerez about the Union.

Even though General Counsel may be technically correct by suggesting that I accord weight to the prior summary judgment case as evidence of Respondent's union animus, I have chosen not to do so. Logicians could easily quarrel that the prior case says nothing about a malevolent motive where the law provides no other means to challenge a certification and where, as here, a key component of the certification test obviously relates the timeliness of Respondent's exceptions in the representation case.

However, the concurrent unlawful conduct of Respondent with respect to the effects bargaining is another matter. At the risk of stating the obvious to some, the relative significance of effects bargaining to employees cannot be trivialized or treated cavalierly in terms of the destructiveness to employee rights protected by this Act.

Far more frequently than not, collective-bargaining agreements contain specific procedures, enforceable through a grievance-arbitration mechanism, relating to reductions in force. Such provisions, together with a just cause standard for disciplinary actions, form the bulwark of job security provisions in a typical collective-bargaining agreement.

Where an agreement is not in place, effects bargaining serves a similar purpose. Because I have concluded that Respondent merely went through the motions of notifying the Union of the City One Stop sale and misled the Union as to the potential effects that sale would have on employees until it was too late for any effective bargaining, such con-

[24] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[25] 277 NLRB 1179 (1985).

duct cannot be dismissed as unrelated to the issues here. On the contrary, Respondent's unlawful effects bargaining conduct strongly supports the claim of an unlawful motive here.

Salazar's direct threat to terminate Marroquin is more problematical. Respondent strongly argues that this testimony should not be credited in view of the General Counsel's failure to call any corroborating witnesses or explain their absence, and Salazar's denial.

Ordinarily, I would agree, without hesitation, with Respondent's argument if I were in a position to lend credence to Salazar's testimony concerning statements he made, or did not make, to employees about the Union. However, Salazar's befuddled and incoherent evasiveness concerning remarks he initially admitted making to Jerez about the Union raises far more serious problems concerning witness credibility than does the General Counsel's failure to seek corroboration for Marroquin's claim that Salazar threatened him. Unlike the situation with Salazar, Marroquin's credibility revolves around an ambiguity about whether fault lies with the General Counsel or with Marroquin himself. Where, as here, I am clearly unable to credit Salazar about whether he spoke to employees concerning the Union, and, if so, what was the tenor of his remarks, I credit both Marroquin and Falcon as no credible denial exists concerning their testimony about Salazar's remarks to them relative to the Union.

By showing that Salazar specifically threatened to terminate Marroquin for his protected activity, the General Counsel provided essential evidence of union animus on the part of the very official appointed to select employees for layoff on August 16. The fact that Marroquin placed this threat in the past 6 months and Falcon testified that the Salazar's disparaging remark to him occurred at the time of his last pay increase in late March or early April indicates that Salazar continued to harbor animus toward their protected activities long after they were likely known. Even Salazar himself testified that his remarks to Jerez about the Union occurred in 1991.

Based on the foregoing, I am satisfied that the General Counsel established a prima facie case that Falcon, Jerez, and Marroquin were selected for termination because of their protected activities of sufficient weight to shift the burden of persuasion to Respondent under the *Wright Line* test.

Respondent's claim that these three individuals were selected for termination primarily because of their high wages and its need to reduce payroll costs in face of the economic adversity in 1990 and 1991 is unconvincing. Even though I am precluded from second guessing management decisions because of their severity alone, inconsistent management conduct can be a strong indicator of a discriminatory motive.

Although Respondent points to the reduction of its payroll costs as a paramount consideration in laying off Falcon, Jerez, and Marroquin, the record is void of evidence that it ever took any similar harsh steps to effect payroll savings. The layoff resulting from the City One Stop sale was the first time Respondent ever laid off employees for economic reasons. The pay increase given Falcon in late March or early April—more than a year after the down turn in business is said to have begun—was near the maximum increase permitted at the time. And Respondent's new wage schedule, devised only shortly after the August layoffs purportedly as a device to cap wages and periodic increases, is devoid of the kind of draconian action reflected in the layoff of Falcon, Jerez, and Marroquin. Even a cursory review of Respondent's new wage schedule shows that few employees threaten the wage cap in any category, the periodic increases established for some of the categories are more generous than they were before and, apparently some raises under the new plan were given a retroactive effect.

Moreover, the fact that Respondent hired three new employees shortly after the August 16 layoff strongly indicates that the layoff was not consistent with its manpower needs. At the very least, by laying off three more employees than were actually employed in the City One Stop operation at the time and hiring three new employees only shortly thereafter, Respondent neutralized any claim that the larger layoff was necessitated by the amount of City One Stop work performed in the regular warehouse. Viewed together with other evidence in this case, the hiring of these three new workers in early September also suggests that some motive undisclosed by Respondent other than the sale of the City One Stop operation was at work in formulating the August 16 layoff.

Finally, Respondent's claim that the work records of Falcon, Jerez, and Marroquin contributed to their selection for layoff is belied by the fact that their overall work records were, on paper, cleaner than at least two of the employees who were retained. The claim that Jerez was selected for layoff based on some objective review of the daily production records was clearly only a secondary consideration and no attempt was made to substantiate Salazar's bare claim on this point. It is reasonable to presume that Jerez did not become the highest paid employee in the warehouse under Respondent's merit pay system by lackluster work performance.

Based on the foregoing discussion, I find that Respondent seized on the layoff necessitated by the City One Stop sale to rid itself of three very active union supporters. In agreement with the General Counsel, I find that a preponderance of the evidence supports the conclusion that Falcon, Jerez, and Marroquin were selected for layoff on August 16 because of their union activities, including their testimony on the Union's behalf at the representation case hearing. Accordingly, I conclude that their terminations violated Section 8(a)(1), (3), and (4), as alleged.

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Respondent's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive representative within the meaning of Section 9(a) of the Act of the following appropriate bargaining unit of employees:

> All packers, shipping and receiving clerks, order pickers, stockers, fixture handlers, warehouse employees, poster shippers, truck drivers, janitors, and inventory

employees employed by Respondent at its facility located at 2551 South Alameda Street, Los Angeles, California; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By failing to provide the Union with the opportunity to bargain concerning the effects on employees resulting from the sale of its City One Stop operation in August 1991 and by refusing to bargain in good faith before implementing a new wage schedule plan in January 1992, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5), and Section 8(d) of the Act.

5. By terminating Miguel Falcon, German Jerez, and Jose Marroquin on August 16, 1991, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act.

6. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

On request of the Union, Respondent must bargain in good faith concerning its wage schedule system. If requested by the Union in furtherance of this bargaining requirement, Respondent must withdraw the wage schedule implemented in late January 1992 or any successor thereto.

In *Royal Plating*,[26] also a partial closing case, the Board concluded that ''a bargaining order, alone, cannot serve as an adequate remedy'' because of the likelihood that only ''pro forma bargaining is all that is likely to result unless the Union can . . . bargain under conditions essentially similar to those that would have obtained, had Respondent bargained at the time the Act required.'' Accordingly, the Board fashioned a remedy designed to restore ''some measure of economic strength to the Union, since Respondent should have bargained when it was still in need of its employees services. Consequently, the Board fashioned a backpay remedy limited by four special conditions and the time period that employer continued to operate the remainder of its business.

Subsequently, in *Transmarine Navigation*,[27] the Board imposed the same remedy in a case involving the failure to engage in timely effects bargaining. There, however, the Board was faced with a situation where the employer closed its entire operation so that the added remedial feature concerning the operation of of a related portion of the enterprise was not relevant.

Read together, these cases and their progeny form the basis for the type of remedial action the Board generally imposes in cases where effects bargaining has been delayed beyond a time when the employee representative still retains a measure of economic strength. I find that to be the case here. By failing to provide the Union with an opportunity to bargain at a time when a panoply of alternatives to abruptly laying off a selection of unilaterally handpicked employees could have been considered, the Respondent deprived its employees of one of the most significant benefits of the collective-bargaining system protected by this Act. Hence, in view of the extremely serious impact Respondent's conduct had on those employees affected by the City One Stop sale and the improbability that a bargaining order alone will serve to effectively remedy this violation, I find that the requested *Transmarine* remedy is appropriate.

Accordingly, Respondent will be required to bargain with the Union concerning the effects on its employees resulting from the sale of its City One Stop operation. In addition, Respondent will be required to pay those employees laid off on August 16, except Falcon, Jerez, and Marroquin, backpay at the rate of their normal wages when last in Respondent's employ, from August 16 until the occurrence of the earlier of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the sale of City One Stop on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he or she would have earned as wages from August 16, 1991, to the time he or she secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less that these employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ. Backpay and interest on these amounts shall be computed in the same manner as specified below with respect to Falcon, Jerez, and Marroquin.

Respondent must immediately offer in writing to reinstate Falcon, Jerez, and Marroquin their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other benefits. Respondent must also make those three employees whole for all losses of pay and benefits suffered by reason of their unlawful terminations. Backpay is to be computed using the *F. W. Woolworth Co.*[28] calendar quarterly formula, adding interest as required in *New Horizons for the Retarded*.[29] Trust fund or profit sharing reimbursements shall accord with *Merryweather Optical Co.*[30]

In accord with *Sterling Sugars*,[31] Respondent must further expunge from its records any reference to the August 16 terminations of Falcon, Jerez, and Marroquin. Each of these employees must be notified in writing that such action has been taken and that any evidence related to that discharge will not be considered in any future personnel action affecting him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

[26] 160 NLRB 990 (1966).
[27] 170 NLRB 389 (1968).
[28] 90 NLRB 289 (1950).
[29] 283 NLRB 1173 (1987).
[30] 240 NLRB 1213 (1979).
[31] 261 NLRB 472 (1982).
[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

Continued

ORDER

The Respondent, Show Industries, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain with General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL–CIO concerning effects on employees represented by that labor organization resulting from the sale of the City One Stop operation in August 1991 and concerning the wage schedule implemented in January 1992.

(b) Terminating employees in order to discourage membership in General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL–CIO or any other labor organization, or because they have given testimony under the Act.

(c) In any like or related manner interfering with, restraining, coercing, or discriminating against employees because they exercise rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain in good faith with General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL–CIO concerning the effects on employees represented by that labor organization resulting from the sale of the City One Stop operation in August 1991.

(b) On request, bargain in good faith with General Warehousemen, Local 598, International Brotherhood of Teamsters, AFL–CIO concerning its wage schedule implemented in January 1992, including, if requested by that labor organization, restoring the compensation plan in effect prior to January 1992.

(c) Make all employees who were terminated on August 16, 1991, as a result of the sale of the City One Stop operation, other than Miguel Falcon, German Jerez, and Jose Marroquin, whole in the manner set forth in the remedy section of the decision.

(d) Immediately offer to reinstate Miguel Falcon, German Jerez, and Jose Marroquin and make each whole for all losses incurred as a result of their August 16, 1991 terminations as specified in the remedy section of the decision.

(e) Expunge from its records any reference to the August 1991 terminations of those employees named in paragraph 2(d), above, and notify each of those individuals in writing that such action has been taken and that his August 1991 termination will not be used in any future personnel action involving him.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the propriety of any offers of reinstatement, backpay, and trust fund or profitsharing reimbursements required by the terms of this Order.

(g) Post at its Alameda Street facilities in Los Angeles, California, copies of the attached notice marked ''Appendix.''[33] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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adopted by the Board and all objections to them shall be deemed waived for all purposes.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''